Awangku Muhammad Murshyid bin Pg Hj Ali & Anor v Makrami bin Hj Md Noor and another appeal

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NOS 4 OF 2009 AND 2 OF 2009
POWER PCA, MORTIMER AND DAVIES JJCA
3 JUNE 2009

Civil Procedure — Pleadings — Defects in pleadings — Laxity in pleadings not to be condoned — One party's defective pleadings ought not to prejudice other party — Whether party surprised by new allegation at trial ought to raise point without delay — Effect of such delay

Damages (personal injury or death) — Action for — Recovery of damages — Future losses

The plaintiff was awarded damages by the Brunei High Court for personal injuries following a road accident. The plaintiff appealed against the award on the ground that the award was insufficient. The defendants appealed against the award for future loss of earnings on the ground that they were not pleaded or claimed in the statement of claim. The defendants submitted that the plaintiff had failed to serve with his statement of claim an estimate of any future expenses and losses under O 18 r 11(1A) of the Brunei Rules of the Supreme Court ('RSC'). The defendants' counsel submitted that O 18 r 11 was mandatory and that the plaintiff's failure to plead the estimate was fatal. Therefore, the plaintiff could not be permitted to recover future loss of earnings and expenses.

Held, allowing Civil Appeal No 2 of 2009 with costs and dismissing Civil Appeal No 4 of 2009 with costs:

(1) Pleadings are of vital importance to the defining of issues between the parties and to the proper conduct of the trial. Laxity in pleadings cannot be condoned (see para 7).

(2) It is the courts task to do justice between the parties. It would be unfortunate if a party were to be deprived of justice through a technicality of pleading. At the same time a deficiency of pleading cannot be tolerated to the prejudice of the other party. If a party is taken by surprise by a new allegation at trial and is prejudiced in his defence it is incumbent upon the party to raise the point without delay. If the wronged party continues to meet the new allegation without objection and only raises the point after the evidence has been concluded, this may be a powerful indication that there is no prejudice (see para 8).

A (3) In the instant case, the defendants were not taken by surprise by the claim for future loss of earnings. The defendants raised no objection to the admission of the evidence and the witnesses were cross-examined about the claim. The defendants had not been prejudiced by the way the case had been presented and pleaded. In the circumstances it was
B fair to both parties to allow the case to proceed and the claim for future loss of earnings to be made (see para 15).

(4) The plaintiff's award for loss of earnings should be increased from B$162,000 to B$324,000. Although not pleaded, the plaintiff's claim
C for Employee Trusts Fund ('TAP') contributions advanced during counsel's submission was unassailable and would cause no prejudice to the defendants. The plaintiff was entitled to be compensated for his employer's TAP contributions. Based on the award for future loss of earnings (B$324,000) the employer's contribution would be 5% of
D B$324,000 or B$16,200 Taking into consideration the element of accelerated payment, the proper award for this loss would be B$12,000 (see paras 28–31).

(5) The plaintiff was seriously disabled as a result of the accident. He
E became blind and could no longer drive a car, which for a young man in Brunei was a serious disability. He was entitled to compensation for his lack of mobility and future care which was likely to increase as he grew older. An appropriate award for such assistance and care would be B$40,000 (see paras 32–33)

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[Bahasa Malaysia summary

Plaintif telah diawardkan dengan ganti rugi oleh Mahkamah Tinggi Brunei untuk kecederaan diri disebabkan oleh satu kemalangan jalan raya. Plaintif merayu terhadap award atas alasan award tersebut tidak mencukupi.
G Defendan-defendan merayu terhadap award untuk kehilangan pendapatan masa depan atas alasan ia tidak diplid atau dituntut dalam penyataan tuntutan. Defendan-defendan berhujah bahawa plaintif telah gagal untuk menyampaikan penyataan tuntutannya bersama anggaran bagi kehilangan
H perbelanjaan dan pendapatan masa depan di bawah A 18 k 11(1A) Kaedah-Kaedah Mahkamah Agung Brunei ('RSC'). Peguam defendan-defendan berhujah bahawa A 18 k 11 adalah mandatori dan kegagalan plaintif untuk memplid anggaran tersebut adalah memudaratkan. Oleh itu, plaintiff tidak dibenarkan untuk memperoleh kehilangan
I pendapatan dan perbelanjaan masa depan.

Diputuskan, membenarkan Rayuan Sivil No 2 Tahun 2009 dengan kos dan menolak Rayuan Sivil No 4 Tahun 2009 dengan kos:

(1) Pliding adalah amat penting untuk menentukan isu antara pihak-pihak

dan untuk pelaksanaan perbicaraan yang betul. Kecuaian dalam pliding tidak harus dibiarkan berlaku (lihat perenggan 7).

(2) Tugas mahkamah-mahkamah adalah untuk berlaku adil antara pihak-pihak. Adalah amat malang jika satu pihak telah dinafikan keadilan disebabkan alasan-alasan teknikal dalam pliding. Pada masa yang sama, kecacatan dalam pliding tidak boleh ditolak ansur jika ia membawa prejudis kepada pihak yang lain. Jika satu pihak dikejutkan dengan dakwaan yang baru semasa perbicaraan dan diprejudis dalam pembelaannya, adalah wajib bagi pihak tersebut untuk membangkitkan perkara itu dengan segera. Jika pihak yang dipersalahkan terus menerima dakwaan yang baru tanpa menentang dan membangkitkan perkara tersebut hanya selepas keterangan diputuskan, ini merupakan indikasi yang kuat bahawa tidak ada prejudis (lihat perenggan 8).

(3) Dalam kes ini, defendan-defendan tidak terkejut apabila menerima tuntutan bagi kehilangan pendapatan masa depan. Defendan-defendan tidak menentang terhadap penerimaan keterangan dan saksi-saksi yang diperiksa balas berkaitan dengan tuntutan tersebut. Defendan-defendan tidak diprejudis melalui cara kes tersebut dibentangkan dan diplid. Dalam keadaan ini, adalah adil untuk kedua-dua pihak untuk membenarkan kes ini diteruskan dan tuntutan bagi kehilangan pendapatan masa depan dibuat (lihat perenggan 15).

(4) Award plaintif bagi kehilangan pendapatan harus dinaikkan daripada B$162,000 kepada B$324,000. Walaupun ianya tidak diplid, tuntutan plaintif untuk caruman Tabung Amanah Pekerja ('TAP') yang dikemukakan semasa penghujahan peguam tidak dapat disangkal dan tidak membawa prejudis terhadap defendan-defendan. Plaintif berhak menerima pampasan untuk caruman TAP majikannya. Berdasarkan award bagi kehilangan pendapatan masa depan (B$324,000), caruman majikan adalah 5% daripada B$324,000 atau B$16,200. Dengan mengambil kira elemen bayaran tambahan, award yang wajar bagi kehilangan tersebut adalah B$12,000 (lihat perenggan 28–31).

(5) Plaintif mengalami kecacatan yang serius disebabkan kemalangan tersebut. Dia telah hilang penglihatan dan tidak mampu membawa kereta, yang merupakan satu ketidakupayaan serius bagi seorang pemuda di Brunei. Dia berhak menerima pampasan untuk pergerakan yang terjejas dan penjagaan masa depannya yang akan bertambah apabila usianya semakin meningkat. Award yang sesuai untuk bantuan dan penjagaan tersebut adalah B$40,000 (lihat perenggan 32–33).]

Notes

For cases on defects in pleadings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5327–5331.

For cases on recovery of damages, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 363–364.

Legislation referred to

Rules of the Supreme Court [BR] O18, O 18 r 11, 11(1A), (1C)

Colin Ong (Lim Chin Wah with him) (Dr Colin Ong Legal Services) for the appellants in Civil Appeal No 4 of 2009.

Eugene Loh (Cheok Sankaran Halim) for the respondent in Civil Appeal No 4 of 2009.

Eugene Loh (Cheok Sankaran Halim) for the appellant in Civil Appeal No 2 of 2009.

Colin Ong (Lim Chin Wah with him) (Dr Colin Ong Legal Services) for the respondents in Civil Appeal No 2 of 2009.

Mortimer JA:

[1] The plaintiff's action concerned in these appeals was for personal injuries following a road accident on the 8 December 2003. Liability was admitted and on 12 April 2008 the deputy chief registrar awarded him a total damages of B$320,889.30.

[2] Both the defendants and the plaintiff appealed and on 16 February 2009, Hayati J dismissed both appeals confirming the deputy chief registrar's award. Both parties now appeal to this court. The defendants against the award for future loss of earnings on the grounds that they were not pleaded or claimed in the statement of claim. The plaintiff appeals on the ground that the judge's award was insufficient.

CIVIL APPEAL NO 4 OF 2009

[3] This is another case in which the plaintiff failed to serve with the statement of claim an estimate of any future expenses and losses (including loss of earnings and of pension rights) under O 18 r 11(1A) which provides:

> (1A)Subject to paragraph (1B), a plaintiff in action for personal injuries shall serve with his statement of claim:
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> (a) ...
>
> (b) a statement of the special damages claimed.

[4] The catch for the unwary practitioner is the unexpected definition of special damages in r 11(1C):

(1C) for the purposes of this rule:

> 'a statement of the special damages claimed' means a statement giving for particulars of the special damages claim and for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights).

[5] Although the plaintiff fulfilled the requirement to serve medical reports and to plead some special damages which had already been sustained, he failed to plead any particulars of loss of earnings both past and future. Indeed quite apart from O 18 the pleadings were seriously deficient in that future loss was not specifically claimed at all.

[6] Dr Ong, who appears for the defendants, submits that O 18 r 11 is mandatory and that a failure to plead an estimate of future loss of earnings and expenses is fatal to the claim and the plaintiff cannot now be permitted to recover them.

[7] As we have said on a number of occasions previously the pleadings are of vital importance to the defining of issues between the parties and to the proper conduct of the trial. Nothing we say is to be taken as condoning laxity in pleadings.

[8] Equally however it is the court's task to do justice between the parties. It would be unfortunate if a party were to be deprived of justice through a technicality of pleading. At the same time a deficiency of pleading cannot be tolerated to the prejudice of the other party. Of course if a party is taken by surprise by new allegation at trial and is prejudiced in his defence it is incumbent upon the party to raise the point without delay. If the wronged party continues to meet the new allegation without objection and only raises the point after the evidence has been concluded this may be a powerful indication that there is no prejudice.

[9] Dr Ong contends that he was prejudiced by the failure to plead future loss of future earnings and the late service of the plaintiff's affidavits. Mr Loh represents the plaintiff. He contends that in spite of the deficiency in his pleadings the defendants were not taken by surprise by the allegation of future loss of earnings. He points to correspondence between the solicitors before the hearing; to Dr Ong's failure to object to the admission of the plaintiff's evidence; to his cross-examination of the plaintiff's witness in the presentation of his case; and to his failure to raise any objection to the pleadings until he submitted his written argument after the close of evidence.

[10] The hearing before the deputy chief registrar to assess damages began on 2 October 2007. The parties were corresponding previously.

[11] On 21 September, 2007 the plaintiff's solicitors wrote to the defendants setting up their claim. This included in item 27 'loss of future earnings' and particulars of his previous salary and age were given. On 27 September 2007 the defendants' solicitors wrote to the plaintiff's solicitors a letter which included the following sentence:

> Whilst we do not at all cast any aspersions on your firm as fellow lawyers, we believe that the plaintiff may have given you false information to back up his claims for future loss of earnings and may have entangled you in a very dangerous situation.

[12] Finally, on the 28 September 2007, the plaintiff's solicitors wrote again to the defendants' solicitors advancing a claim for loss of earning capacity which from the particulars given was clearly a claim for loss of future earnings.

[13] The defendants were well aware of the plaintiff's intention to claim future loss of earnings together with the details of his previous salary, his annual increments, his age and his retirement age. Affidavits were produced late by the plaintiff at the beginning of the trial but this seems to have been provoked by the allegations made by the defendants in their letter of 27 September 2007 to which we have referred.

[14] At trial plaintiff and his witnesses were cross-examined. This included cross-examination about salary and the fact that the plaintiff had been working for his brother. No objection was taken to the admission of this evidence-in-chief and no reference was made to the deficiency in the pleading at that time. The appeal and rehearing in front of Hayati J began on 3 October 2008. Dr Ong now vigorously contended that the deficiency in the pleading was a bar to any award of future loss of earnings. The plaintiff was provoked by this to apply for an adjournment to amend the pleadings but, after the defendants had tried to challenge the adjournment in this court, abandoned the application on the basis that by this time the claim had been fully particularised and set out in correspondence, affidavits and oral evidence. Dr Ong's submission was firmly rejected by the judge on the basis that the manner in which the defendants case had been advanced demonstrated that they were not in any way prejudiced. Previously the deputy chief registrar had rejected the submission on similar grounds.

[15] The defendants were not taken by surprise by the claim for future loss of earnings, the defendants who raise no objection to the admission of the

evidence, the witnesses were cross-examined about the claim and the defendants have not been prejudiced by the way this case has been presented and pleaded. In the circumstances it was just to both parties to allow the case to proceed and the claim for future loss of earnings to be made.

[16] For these reasons we agree with the approach of both the deputy chief registrar and the judge. They were each correct in their firm rejection of the defendants' submissions and we dismiss Civil Appeal No 4 of 2009 with an order nisi for costs.

CIVIL APPEAL NO 2 OF 2009

[17] Agreeing with the deputy chief registrar the judge awarded a total of B$320,889.30. In detail the award was as follows:

General Damages

1.	Loss of future earning	$162,000
2.	Loss of TAP contribution	$0
3.	Loss of vision	$ 60,000
4.	Future of surgery for the left eye	$ 20,000
5.	Driver cum domestic helper	$0
6.	Loss of amenities	$ 20,000
7.	Multiple scars	$ 15,000
8.	Loss of car BK8755	$ 5,000
	Subtotal	$282,000
	Agreed general damages	$ 34,500
	Grand total	$316,500

SPECIAL DAMAGES

[18] The special damages has been agreed at $4,389.30. Mr Loh contends that in certain respects this award is too low. He takes three points.

[19] First, he says at the judge's assessment of the average monthly endings of B$900 was wrong as she failed to take into account the annual increments received by the plaintiff. By the time of the hearing in 2007 his earnings would have been B$1,300 per month.

[20] Secondly, he submits that the judge ought to have awarded the plaintiff a sum for his future loss of benefits in the employee's provident fund — the TAP.

A **[21]** Finally, he claims that the plaintiff's disability is such that he should be awarded the cost of employing a driver cum domestic helper to properly compensate him.

FUTURE LOSS OF EARNINGS

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[22] Dr Ong was tempted to revisit some of the factual issues raised at trial but he put nothing before the court which demonstrates that either the judge or the registrar was in error in their findings on the nature of the plaintiff's employment with his brother or the level of his pre-accident earnings.

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[23] This included the brother's description of the plaintiff as an employee. In para 7 of his affidavit he says:

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> The plaintiff proved to be an asset to the firm; he was very hardworking and had very good relationships with customers and was more disciplined and dedicated than any of the other employees I had. He never attempted to quit the job like the other employees and because of all this I increased his pay to $600.00 a month in January 2002 and $700.00 a month in January, 2003.

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[24] Contrary to Dr Ong's contention that the plaintiff may obtain other employment we are satisfied that the judge and the registrar properly found that he was entitled to full compensation for future loss of earnings. The plaintiff has tried to obtain employment without any success.

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[25] Upholding the registrar, the judge assessed his projected future earnings as $900 per month. This was the level of his earnings prior to the accident in 2003. Here we are satisfied the judge fell into error. The plaintiff was receiving increments each year of $100 per month. By the time of the trial therefore it is likely that he would have been earning $1,300 per month. This is the starting point for the assessment of his future loss of earnings.

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[26] The future is much less certain. He could not have continued working for his brother whose business had contracted. In the circumstances it would be wrong to find that he would have continued receiving increments of $100 per month until the age of 55 as submitted by Mr Loh. This would introduce arithmetical certainty into a completely uncertain future and would be likely to lead to error and over compensation.

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I **[27]** However, on the brother's evidence, but for the accident, the plaintiff was likely to have remained in employment and to have been a valued employee. Within the limitations of his education it is likely that his earnings

would have modestly increased over the years. Making the best assessment we can in these circumstances we think a reasonable estimate of his average future loss is $1,800 per month. For a man of 27 years who could expect to work at least to the age of 55 a multiplier of fifteen years is well within the appropriate range to account for the future vicissitudes of life and accelerated payment. It is certainly not too high.

[28] Accordingly we allow this appeal and increase the award for future loss of earnings from $162,000 to $324,000 ($1,800 x 12 x 15 = $324,000).

EMPLOYEE'S PROVIDENT FUND TAP

[29] Again the claim for this loss is not pleaded and was only advanced as a sound claim during Mr Loh's submissions. Nevertheless, once made the claim is unassailable and we allow it. There can be no prejudice to the defendants.

[30] By law employers must pay into this fund 5% of the employee's wages as the employer's contribution for the employee's benefit. In the absence of employment the plaintiff will lose the benefit. For this he is entitled to be compensated.

[31] Consistent with our award for future loss of earnings the employer's contribution would have been 5% of $324,000 or $16,200. This is the basic figure for any assessment but as the fund cannot usually be drawn upon until the beneficiary is 55 years of age, except for the purpose of buying or building a house, there is a very considerable element of accelerated payment of any award of this kind to a man of the plaintiff's age. Taking this into account we think the proper award for this loss in this case is $12,000.

ASSISTANCE AND CARE

[32] The plaintiff is seriously disabled. He is properly described as 3/4 blind. He can no longer drive a car and for a young man in Brunei it is a serious disability. He has lost his independence and mobility. He relies much upon family and friends. Consequently he claims that to be properly compensated he needs permanent assistance in the form of a driver/domestic helper. Detailed figures have been provided and an award approaching $100,000 would be justified if this need is established as a proper award in this case.

[33] However, we are satisfied that in spite of the plaintiff's serious disability, to provide a permanent employee to assist him for the rest of his

life would be over compensation. Without in any way diminishing his problems he is by no means totally disabled. Nevertheless, on all the evidence he is entitled to some compensation for his lack of mobility and future care. His difficulty is likely to increase as he gets older. Bearing in mind that the approximate sum which would be awarded for full compensation of this kind we think it appropriate to award him $40,000.

ORDERS

Civil Appeal 4 of 2009

[34] We dismiss Appeal No 4 of 2009.

[35] We order nisi that the defendants will pay the costs of the appeal to the plaintiff to be taxed if not agreed.

Civil Appeal 2 of 2009

[36] We allow Appeal No 2 of 2009.

[37] We give judgment to the plaintiff for total general damages of $530,500 and in addition special damages of $4,389.30.

[38] We order nisi that the defendants will pay the costs of the appeal to the plaintiff to be taxed if not agreed.

[39] The orders nisi will become absolute at 11am on 4 June 2009 unless prior application is made to the court.

INTEREST

[40] In accordance with the standard practice in Brunei we award interest as follows:

(a) 3% on the award of special damages from the date of the accident on 8 December 2003 until the date of the judgment by the deputy chief registrar.

(b) 6% on the award of general damages from the date of the accident on 8 December 2003 until the date of the above judgment.

(c) 6% statutory interest on all judgment awards from the date of judgment until payment.

Civil Appeal No 2 of 2009 allowed with costs and Civil Appeal No 4 of 2009 dismissed with costs.

Reported by Andrew Christopher Simon